GOOGLE LLC'S OPPOSITION TO PLAINTIFFS' MOTION IN LIMINE 1 TO PRECLUDE GOOGLE FROM RELYING ON NON-PUBLIC SOURCE CODE AT TRIAL

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA, OAKLAND DIVISION

CHASOM BROWN, *et al.*, on behalf of themselves and all others similarly situated, Plaintiffs, v. GOOGLE LLC, Defendant.	Case No. 4:20-cv-03664-YGR-SVK **GOOGLE LLC'S OPPOSITION TO PLAINTIFFS' MOTION *IN LIMINE* 1 TO PRECLUDE GOOGLE FROM RELYING ON NON-PUBLIC SOURCE CODE AT TRIAL** The Honorable Yvonne Gonzalez Rogers Date: November 29, 2023 Time: 9:00 a.m. Location: Courtroom 1 – 4th Floor Trial Date: January 29, 2024

I.   INTRODUCTION

Plaintiffs' expert Mr. Hochman plans to testify that a particular Google log is evidence that Google joins data from signed-out private browsing with data associated with a user's Google account.[1] *See* Dkt. 1002-3 ("Hochman Second Supp. Rep.") at ¶¶ 43–47. Plaintiffs made the same argument during the sanctions proceedings, and Google produced the code underlying that log to demonstrate that it cannot combine authenticated and unauthenticated log entries. Judge van Keulen reviewed competing expert declarations interpreting that code and denied Plaintiffs' request to preclude Google from contesting the very mischaracterization of the log Mr. Hochman intends to advance at trial. Plaintiffs now seek to exclude key evidence disproving Mr. Hochman's assertions. Precluding Google from relying on the disputed code would not only be unfair and unduly prejudicial, but it would also pose a real risk of misleading the jury.

Plaintiffs, for their part, can claim no prejudice. Plaintiffs' expert Jay Bhatia spent multiple days reviewing the code they now seek to exclude—along with ▮▮▮ *additional* lines of code Google provided at Plaintiffs' request—nearly a year before trial. Mr. Hochman himself had the opportunity to review the code, but declined. The Court should deny Plaintiffs' Motion.

II.   BACKGROUND

A.   Plaintiffs Placed the Source Code at Issue By Misrepresenting the Import of a Log Google Identified in the Course of the Second Sanctions Proceedings

The disputed code is relevant because *Plaintiffs* put it at issue. During the course of the supplemental sanctions proceedings, Plaintiffs argued (incorrectly) that a particular log Google disclosed shows "how Google joins private browsing data with authenticated data." Dkt. 655-1 (Pls. Supp. Sanctions Br.) at 2; *see also id.* at 2–3 ("[T]hese additional logs contain highly relevant data . . . , including . . . private browsing data that Google joins with authenticated data."). To rebut Plaintiffs' inaccurate characterizations, Google's expert Dr. Psounis examined the code underlying the log and determined that it prohibits the combination of authenticated

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[1] Google has separately moved to exclude those opinions as irrelevant and unreliable, *see* Dkt. 1003, and exclude in *limine* argument regarding "joining" authenticated and unauthenticated data. If Google's motions are granted, Google does not expect to introduce source code at trial.

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1   and unauthenticated log data. Dkt. 797-21 (Nov. 30, 2022 Psounis Decl.) ¶ 18.

2   Pursuant to Judge van Keulen's order that "Google must provide to Plaintiffs and the

3   Court all facts or data considered by any person proffering evidence," Google invited Plaintiffs'

4   experts to review the code Dr. Psounis relied on. Dkt. 797-3 (Google's Resp. to Order to Show

5   Cause) at 10; Dkt. 857-05 (email correspondence with Plaintiffs) at 11. Plaintiffs' expert Jay

6   Bhatia examined that code in December 2022 and submitted a declaration opining that it was

7   insufficient to validate Dr. Psounis's opinions. Dkt. 834-3. To resolve these putative

8   insufficiencies, Google produced an additional ███████ lines of related code and agreed with

9   Plaintiffs on a schedule by which its experts would examine that code and submit any further

10   opinion or argument. Dkt. 857-06 at 1–2. Mr. Bhatia spent two days examining that additional

11   code in February 2023 and chose to submit no further opinion. Dkt. 942-4 ¶ 12. After reviewing

12   the parties' submissions, Judge van Keulen properly denied Plaintiffs' request to "preclude[]

13   [Google] from arguing that it does not join Incognito browsing data to authenticated data."

14   Dkt. 755-7 (Plaintiffs' requests for preclusive sanctions); *see* Dkt. 898 (order denying Plaintiffs'

15   requested evidentiary preclusion).

16   **B.   Mr. Hochman Declined to Review the Source Code Even Though Google Made It
17   Available to Him**

18   Plaintiffs' claim that "Mr. Hochman did not have access to that code while drafting any

19   of his reports" is an affirmative misrepresentation. Plaintiffs served Mr. Hochman's Second

20   Supplemental Report on June 23, 2023, *six months* after Plaintiffs chose *not* to have Mr.

21   Hochman inspect the code Google offered. Plaintiffs' assertions that Google deprived Mr.

22   Hochman of access to that code contradict his own sworn testimony acknowledging the "proffer

23   of source code by Google, which [he] essentially rejected" after "ask[ing] Jay [Bhatia] to look

24   at it" and determining that "it didn't appear to be . . . the kind of review that [he] would like to

25   do." Oct. 10, 2023 Hochman Rough Tr. 15:3–16, 55:3–8.

26   **C.   Mr. Hochman Placed the Code at Issue In His Eleventh-Hour Second Supplemental
             Report**

27   After the sanctions proceedings concluded, Google had no further intention of relying on

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1   the disputed code, especially in light of Plaintiffs' admission that they "do not have evidence

2   that [the logs at issue] joined [authenticated and unauthenticated] data." Mar. 2, 2023 Hrg. Tr.

3   66:1–3.[2] Google has included that code on its trial exhibit list only because on June 20, 2023—

4   more than six months after Google produced the code Mr. Hochman declined to review—

5   Plaintiffs served Mr. Hochman's Second Supplemental Report, which once again placed the

6   disputed code at issue, including by: (i) "address[ing] in [his] report" a declaration concerning

7   that code, *see* Hochman Second Supp. Rep. ¶ 2; and (ii) repeating Plaintiffs' disproven claims

8   that a Google log joins authenticated and unauthenticated data, *id.* ¶¶ 43–47. If Plaintiffs do not

9   raise these arguments at trial, Google has no intention of relying on source code.

10   **III.   ARGUMENT**

11   There can be no dispute that the code at issue is relevant. Mr. Hochman intends to testify

12   that a Google log shows that Google joins signed-out private browsing data with authenticated

13   data, Hochman Second Supp. Rep. ¶¶ 43–47, and the disputed code definitively proves the

14   contrary. That is exactly the kind of probative evidence that must be admitted under Rule 402.

15   Indeed, excluding that evidence would unduly prejudice Google, and mislead the jury, by

16   depriving Google of a full opportunity to explain the falsity of Mr. Hochman's opinions.

17   Plaintiffs also cannot argue that this evidence is prejudicial to them. First, Mr. Hochman

18   had every opportunity to inspect the disputed code (and Dr. Psounis's analysis thereof) during

19   the sanctions proceedings, and elected not to. Even so, another of Plaintiffs' experts spent

20   multiple days examining that code—as well as numerous related code files Google produced at

21   Plaintiffs' request—nearly a year before trial. Moreover, despite Plaintiffs' accusations of

22   "informational imbalance," there is no unfair asymmetry here: neither Dr. Psounis nor any other

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24   [2] As Google explained to Plaintiffs in February 2023, "Google . . . does not intend to rely on
source code for purposes other than the [sanctions proceedings]," but "[t]o the extent Plaintiffs
25   later put the [disputed] log at issue and claim it joins authenticated and unauthenticated data,
Google reserves the right to rely on the code on which it has already relied in the course of
26   responding to the OSC." That is exactly what Mr. Hochman has done. Plaintiffs' argument that
they "never agreed" to Google's reservation of rights, Mot. 3, is irrelevant to their so-called
27   "prejudice." Google made its position clear in writing nearly a year before trial, and Plaintiffs
did not object. Dkt. 942-4 ¶ 10.
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1   Google expert has reviewed *any* code that was not produced to Plaintiffs, and Plaintiffs deposed

2   Dr. Psounis for seven hours on his rebuttal to Mr. Hochman's June 20 report, including his

3   source code analysis.

4   Second, Plaintiffs' argument that Google "*deprived* Plaintiffs of the ability to conduct

5   any discovery regarding any Source Code" through "repeated obstruction," Mot. 4, is deeply

6   misleading. Google did not "deprive" Plaintiffs of anything; *the Special Master and Judge van*

7   *Keulen rejected Plaintiffs' demand* that Google produce certain categories of code—none of

8   which had anything to do with the code at issue here[3]—because those requests were "overbroad

9   and not proportional to the needs of the case." Dkt. 299 at 12; Dkt. 331 at 2–3. That Plaintiffs'

10 prior discovery requests were overbroad should not preclude Google from rebutting their false

11 assertions now, particularly where Google has (i) disclosed its opinions in an expert report, (ii)

12 subjected that expert to deposition, and (iii) made the relevant code available to Plaintiffs.

13   None of Plaintiffs' cases supports exclusion here. Unlike in *Apple v. Samsung*, 2012 WL

14 1595784, at **3–4 (N.D. Cal. May 4, 2012), Plaintiffs' expert had ample opportunity to review

15 the code and simply declined. Unlike in *Yeti by Molly v. Deckers Outdoor*, 259 F.3d 1101, 1106–

16 07 (9th Cir. 2001), Google served Dr. Psounis's report in response to Plaintiffs' own eleventh-

17 hour report—and in any event did so more than "one month before [trial]" and with more than

18 sufficient time for Plaintiffs to depose him (which they did, for seven hours, on October 9, 2023).

19 And unlike in *Cornell v. Hewlett Packard*, 2006 WL 5097357, at *21 (N.D.N.Y. Nov. 13, 2006),

20 Plaintiffs here opened the door for Google to rely on the disputed code by offering new post-

21 discovery opinions, and Google gave them a full opportunity both to examine the relevant code

22 and depose Dr. Psounis on his opinions about it.

23 **IV.   CONCLUSION**

24   For the foregoing reasons, the Court should deny Plaintiffs' motion *in limine* to exclude

25 evidence and argument regarding Google's production of source code.

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27 [3] For instance, the "eight separate requests for certain Source Code" Plaintiffs refer to in their motion, Mot. 1, were for code associated with Chrome browser functions, websites using Google

28 Analytics, and websites using Google Ad Manager—not the function of the log at issue.

1   DATED: October 17, 2023   Respectfully submitted,

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